Supreme Court, U.S.
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No. 97-1195

In The

Supreme Court of the United States

October Term, 1997

THE AEROSPACE CORPORATION,

Petitioner,

vs.

FRED D. CAMPBELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Dissatisfied with the questions presented by petitioner, respondent states the question presented is whether the Employee Retirement Income Security Act of 1974 (ERISA), codified as 29 U.S.C. § 1001 *et seq.*, preempts a state common law tort action for wrongful termination of employment in violation of public policy in which the employee alleged he was discharged in retaliation for whistle-blowing activities, and, seeking the ancillary remedies of compensatory and punitive damages, alleged that petitioner knew discharging him would have a negative effect on his retirement benefits.

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STATEMENT OF CASE

Fred D. Campbell ("Campbell") sued his former employer, The Aerospace Corporation ("Aerospace"), in California's state court for wrongful termination of employment. The complaint was pleaded in six counts under alternative tort and contract theories of liability all arising from the same general set of facts. In the first count of the complaint, Campbell pleaded a common law tort cause of action for wrongful termination in violation of public policy, for which he sought the ancillary remedies of compensatory and punitive damages. He alleged Aerospace terminated him in retaliation for "blowing the whistle" on illegal activity of Aerospace, namely, its illegal billing of the United States Air Force. Compensatory damages he sought were alleged in paragraph 9 of the first count. The critical allegations at issue in this case are contained in paragraph 10 of the first count, the paragraph of the complaint in which Campbell sought the assessment of ancillary punitive damages against Aerospace for its oppressive, fraudulent, and malicious conduct toward him in conscious disregard of his rights[1] when it terminated him in retaliation for engaging in protected whistle-blowing activities. Paragraph 10, in pertinent part, provides:

> In doing the acts set forth above, defendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, would require plaintiff to be without certain benefits and would make it extremely difficult for plaintiff to obtain employment because of his high salary, advancing age and the stigma of termination for cause. . . .

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1. *See*, California Civil Code § 3294(c)(2), California's punitive damages statute.

> Defendants conduct warrants the assessment of punitive damages.

App. to Pet. for Cert., H-54-55.

Aerospace contended throughout the litigation, and contends before this Court in its petition, that because of the allegations in paragraph 10 of the complaint, Campbell stated an independent claim which "relates to" its covered employee benefits plan and is therefore preempted by ERISA. It is on this theory of preemption that Aerospace bases its contention that federal subject matter jurisdiction was established in this case. This contention prevails if, but only if, ERISA preempts Campbell's state cause of action.

Campbell contends, on the other hand, that the paragraph 10 allegation is parasitic to his common law state claim for wrongful termination and was made to justify the ancillary remedy of punitive damages under state pleading rules, which he sought in order to punish Aerospace for its egregious conduct in terminating him for engaging in protected whistle-blowing activities. As a result, his cause of action is not preempted by ERISA, and thus, the district court lacked federal subject matter jurisdiction over the case.

Based on the paragraph 10 allegation, Aerospace removed the case to federal court on the theory Campbell's action was preempted by ERISA. Campbell did not challenge removal at that time. Soon thereafter the parties stipulated to dismissal of Campbell's two age discrimination counts. Aerospace then moved for summary judgment claiming that Campbell failed to allege the statutory or constitutional public policy violated by his termination. Campbell's opposition identified only the federal False Claims Act, 31 U.S.C. §§ 3729-3721. The court granted, in part, Aerospace's motion, resulting in dismissal of two of

Campbell's theories of liability: (1) tortious discharge in violation of public policy, and (2) defamation; leaving for trial only two alternative theories of liability for wrongful termination of employment under California substantive law: (1) breach of the implied in fact covenant not to discharge except for cause, and (2) breach of the implied in law covenant of good faith and fair dealing.

Following summary judgment, Campbell's motion to remand the action to state court was denied. At the conclusion of a bench trial, the court found Aerospace was not liable and rendered judgment in its favor. Campbell appealed on the sole ground that the district court lacked subject matter jurisdiction over the case. In a published decision, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held that the district court lacked subject matter jurisdiction over the case because Campbell's state court claim was not preempted by ERISA, and reversed the judgment with instructions to remand the case to the Superior Court of California for the County of Los Angeles. *Campbell v. The Aerospace Corporation*, 123 F.3d 1308 (1997). The decision of the Ninth Circuit was filed September 3, 1997. On October 22, 1997, the Ninth Circuit denied Aerospace's petition for rehearing and rejected its suggestion for rehearing en banc. Aerospace then filed a petition for writ of certiorari on January 20, 1998, seeking to have this Court accept certiorari to reverse the decision of the Ninth Circuit. Campbell files this respondent's brief to state his reasons why this Court should deny Aerospace's petition.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

Campbell commenced this action in California state court against Aerospace, his former employer, for wrongful discharge in violation of public policy, seeking compensatory and punitive damages. In paragraph 10 of the complaint, the punitive damages paragraph, Campbell alleged:

> In doing the acts set forth above, defendants knew (a) that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, (b) would require plaintiff to be without certain benefits and (c) would make it extremely difficult for plaintiff to obtain [other] employment because of his high salary [at Aerospace], advancing age and the stigma of termination for cause. . . . Defendants conduct warrants the assessment of punitive damages.

App. to Pet. for Cert., H-54-55, lettered parentheses and brackets added.

Aerospace removed the case to federal court on an ERISA preemption theory, contending that because Campbell charged in paragraph 10 of his complaint that Aerospace terminated him intending to deprive him of benefits, he raised an independent claim which "relates to" its covered employee benefit plan and is therefore preempted by ERISA.

Campbell contended throughout this litigation, as well as now before this Court, that referring to the negative effect

termination would have on his retirement benefits did not raise an independent claim for punitive damages which "relates to" Aerospace's "employee benefit plan" within the meaning and purposes of ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a). Rather, his seeking of punitive damages was ancillary or parasitic to his state common law claim for wrongful termination, and thus comes squarely within the purposes and objectives sought to be accomplished by ERISA's preemption provision.

The issue thus presented to the Ninth Circuit was whether ERISA preempts Campbell's state common law action for tortious termination in violation of public policy, wherein he sought the ancillary remedies of compensatory and punitive damages, based in part on the allegation that Aerospace knew terminating him would have a negative impact on his retirement benefits. In a well-reasoned decision, referring to and relying on several of this Court's most recent decisions in ERISA preemption cases, the Ninth Circuit decided that Campbell's action was not preempted and that the district court lacked subject matter jurisdiction. *Campbell v. The Aerospace Corporation*, 123 F.3d 1308 (1997). Aerospace, by its petition, asks this Court to accept certiorari and to decide the same issue differently than the Ninth Circuit. Campbell believes the Ninth Circuit came to the right decision for the right reasons as will be demonstrated hereinafter.

II.

THE BROAD SCOPE OF ERISA PREEMPTION IS NOT WITHOUT LIMIT.

In an effort to define the scope and boundaries of the preemptive reach of § 514(a)[2] of the ERISA statute since its enactment in 1974, this Court has accepted certiorari in, and decided no less than 16 cases.[3] Justice Scalia, stating these same

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2. Section 514(a) of ERISA provides: "[e]xcept as provided in subsection (b) of this section, the provisions of this [statute] shall supersede any and all *State laws* insofar as they may now or hereafter *relate to* any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). None of the exceptions in subsection (b) is directly at issue in this case. Italics added. Section 514(c)(1), 29 U.S.C. § 1144(c)(1), defines "state law" as including "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA preempts state law causes of action as they relate to employee benefit plans. *Rozzell v. Security Services* 38 F.3d 819, 821, n.3 (5th Cir. 1994).

3. *DeBuono v. NYSA-ILA Medical and Clinical Services*, __ U.S. __, 117 S. Ct. 1747 (1997); *California Div. of Labor Standards Enforcement v. Dillingham Constr. N. A., Inc.*, __ U.S. __, 117 S. Ct. 832 (1997); *Boggs v. Boggs*, __ U.S. __, 117 S. Ct. 1754 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Inc. Co.*, 514 U.S. __, 115 S. Ct. 1671 (1995); *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 114 S. Ct. 517 (1993); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 113 S. Ct. 580 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S .Ct. 478 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668 (1989); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107

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statistics, suggested that these "prior decisions have not succeeded in bringing clarity to the law [regarding ERISA preemption]." *DeBuono v. NYSA-ILA Medical and Clinical Services*, 117 S. Ct. 1747 (1997), J. Scalia, dissenting, at p. 843, bracket added. Campbell suggests, however, that these cases, especially the more recent ones, help demonstrate the correctness of the Ninth Circuit's decision in this case. This is especially true, as one applies this case law to the case at bench, a case concerning state law of general applicability involving a common law tortious termination action in which the only reference to a covered employee benefit plan is an allegation in a paragraph of plaintiff's complaint seeking ancillary punitive damages.

To begin, the Ninth Circuit decision in this matter, *Campbell, supra*, at 1311, acknowledges, as does Campbell, that a number of the United States Supreme Court cases, especially the older cases, have given a broad interpretation to the clause in § 514(a), which provides that any state law, including an action for wrongful termination, is preempted if it "relates to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). These cases hold that § 514(a) is to be read broadly and expansively to reach any state law having a connection with, or reference to, a covered employee benefit plan. Supporting this interpretation the Court has said:

> that the "breadth of [that provision's] preemptive reach is apparent from [its] language," *Shaw, supra*, 463 U.S., at 96, 103 S. Ct., at 2899-2900; that it

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(Cont'd)
S. Ct. 1542 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 482 U.S. 41, 107 S. Ct. 1549 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S. Ct. 1895 (1981).

> has a "broad scope," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 2388-2389, 85 L. Ed. 2d 728 (1985); and an "expansive sweep" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 1552-1553, 95 L. Ed. 2d 39 (1987); and that it is "broadly worded," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S. Ct. 478, 482, 112 L. Ed. 2d 474 (1990), "deliberately expansive," *Pilot Life, supra*, 481 U.S., at 46, 107 S. Ct., at 1552, and "conspicuous for its breadth," *Holliday, supra*, 498 U.S., at 58, 111 S. Ct., at 407." *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037.

Moreover, under the above "broad common-sense meaning, a state law may 'relate to' a benefit plan, and thereby be pre-empted even if the law is not specifically designed to affect such plans or the effect is only indirect." *Ingersoll-Rand, supra*, 111 S. Ct., at 483; *Travelers, supra*, 115 S. Ct., at 1676; *District of Columbia, supra*, 113 S. Ct., at 583; *Mackey, supra*, 108 S. Ct., at 2192; *Pilot Life, supra*, 107 S. Ct., at 1553; *see also Alessi, supra*, 101 S. Ct., at 1907.

As the Ninth Circuit decision pointed out, *Campbell, supra*, at 1311-1312, notwithstanding the language of the above cases giving a broad scope and expansive reach to the preemption language of § 514(a), the reach of ERISA is not without limits. To the same effect this Court said: "*Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.*" *Shaw, supra*, 103 S. Ct., at 2901, n.21, italics added; "Notwithstanding its breath, we have recognized limits to ERISA's pre-emption clause." *Ingersoll-Rand, supra*, 111 S. Ct., at 483," citing *Mackey, supra*, 108 S. Ct., at 2182; also see *Mackey, supra*, at 108 S. Ct., at 2192, referring to the *Shaw*

language quoted above; " '[p]reemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, *as is the case with many laws of general applicability*.' " *Travelers, supra*, 115 S. Ct., at 1680, italics added, quoting *District of Columbia, supra*, 113 S. Ct. 583, n.1; *see, e.g., Mackey, supra*, 108 S. Ct., at 2190 (holding that ERISA did not preempt a State's generally applicable garnishment statute, even when applied to collect judgments against plan participants); *Fort Halifax Packing Co., supra*, 107 S. Ct., at 2221 (finding no ERISA preemption even though state law required payment of severance benefits because law did not require the establishment or maintenance of an ongoing plan).

Petitioner makes no mention of the limits this Court has placed on the "reach" of ERISA preemption.

III.

CLAIMS OF PREEMPTION ARE PROPERLY ADDRESSED WITH THE STARTING PRESUMPTION THAT CONGRESS DOES NOT INTEND TO SUPPLANT STATE LAW.

Perhaps an even more important limitation to ERISA's broad and expansive preemption reach, brought about by the Court's construction of the literal language of § 514(a), is the recently acknowledged and enunciated *presumption against ERISA preemption*. In *Travelers, supra*, 115 S. Ct. at 1676, this presumption against preemption was directly considered when the Court asked whether ERISA's "relates to" language was intended to modify "the starting presumption that Congress does not intend to supplant state law." The Court in *Travelers* stated this presumption against preemption as follows:

> . . . despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Travelers, supra, 115 S. Ct., at 1676, citations omitted, citing, *Rice v. Santa Fe Elevator Corp.*, 67 S. Ct. 1146, 1152 (1947).

In *DeBuono v. NYSA-ILA Medical and Clinical Services*, 117 S. Ct. 1747 (1997), the Court continued its recent attention to the presumption against preemption that it had examined in *Travelers* and went even further in explaining how the Court decides whether a state law is preempted or is not preempted by ERISA. It stated:

> In *Travelers*, as in our earlier cases, we noted that the literal text of § 514(a) is "clearly expansive." 514 U.S., at 655, 115 S. Ct., at 1677. But we were quite clear in that case that the text could not be read to "extend to the furthest stretch of its indeterminacy, [or] for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." H. James, *Roderick Hudson* xli (New York ed., World's Classics 1980). *Ibid.*
>
> In our earlier ERISA pre-emption cases, it had not been necessary to rely on the expansive character of

> ERISA's literal language in order to find pre-emption because the state laws at issue in those cases had a clear "connection with or reference to," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2899-2900, 77 L. Ed. 2d 490 (1983), ERISA benefit plans. But in *Travelers* we confronted directly the question whether ERISA's "relates to" language was intended to modify "the starting presumption that Congress does not intend to supplant state law." We unequivocally concluded that it did not, and we acknowledged "that our prior attempt[s] to construe the phrase "relate to" d[o] not give us much help drawing the line here." In order to evaluate whether the normal presumption against pre-emption has been overcome in a particular case, *we concluded that we "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.*"

Id. at 1751, citations omitted, italics added; also see, *Dillingham, supra*, 117 S. Ct., at 838.

Thus, this Court has recognized that the broad interpretation given the ERISA preemption provision § 514(a), by the older cases, may no longer be definitive or conclusive when determining whether a state law is preempted or not preempted and should not be "taken to extend to the furthest stretch of its indeterminacy." *Travelers, supra*, 115 S. Ct., at 1677; quoted in *Campbell, supra*, at 1311. Justice Scalia, in his 1997 concurring opinion in *Dillingham, supra*, 117 S. Ct., at 843, put it this way:

> Today's opinion is no more likely than our earlier ones, however, to bring clarity to this field —

> precisely because it does obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them have in effect been abandoned. Our earlier cases sought to apply faithfully the statutory prescription that state laws are pre-empted "insofar as they . . . relate to any employee benefit plan." Hence the many statements, repeated today, to the effect that the ERISA pre-emption provision has a "broad scope," an "expansive sweep," is "broadly worded," "deliberately expansive," and "conspicuous for its breadth." *Ante,* at 837-838. *But applying the "relate to" provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.* Accord, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* 514 U.S. __, __, 115 S. Ct. 1671, 1674, 131 L. Ed. 2d 695 (1995). *The statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not.*

Id., at p. 843, italics added; quoted in part in *Campbell, supra,* at 1311.

These recent cases show a decided movement of thinking away from the older cases where this Court sought to interpret the "relate to" preemption language of ERISA in a broad and comprehensive manner. Rather, this Court's decisions of its last two terms instruct that courts must look to the Congressional "objectives" of ERISA as a guide to the scope of state law that Congress understood or intended would be preempted.

Petitioner makes no mention of this presumption against preemption, or of the standard for evaluating whether the presumption has been overcome in a particular case.

IV.

COURTS MUST LOOK TO CONGRESSIONAL OBJECTIVES IN ENACTING ERISA AS A GUIDE TO THE SCOPE OF STATE LAW THAT CONGRESS UNDERSTOOD OR INTENDED WOULD SURVIVE PREEMPTION.

This Court, in *DeBuono, Dillingham* and *Travelers, supra*, recognized that Congress' objectives in enacting ERISA and its preemption provision was to establish uniform laws to regulate *the administration* of pension funds. Thus, the Court stated:

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government, and to prevent the potential for conflict in substantive law requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Id. at 1677, quoting *Ingersoll-Rand, supra*, 111 S. Ct., at 484; quoted in *Campbell, supra*, at 1312.

As reflected above, it is important to note that in reaching its decision that Campbell's state court wrongful termination action is not preempted by ERISA, the Ninth Circuit's opinion examines, discusses, quotes from, and applies the holdings from two of this Court's most recent ERISA preemption cases, the 1995 *Travelers* decision, Justice Souter speaking for the Court, and the 1997 *Dillingham* decision, Justice Thomas speaking for the Court, with Justice Scalia concurring. *Campbell v. The Aerospace Corporation*, 123 F.3d 1308, 1311-1312. Petitioner

makes no mention of this Court's decisions in *DeBuono*, *Dillingham*, or *Travelers, supra.*

V.

THE EMPLOYER'S ALLEGED MOTIVE IN TERMINATING THE EMPLOYEE IS CRITICAL IN DETERMINING WHETHER THE ACTION IS PREEMPTED BY ERISA.

Recognizing the broad but not limitless scope of ERISA and the Court's guidance and direction to consider the objectives and goals of ERISA, the Ninth Circuit next considered, as does Campbell, the application of ERISA preemption to state wrongful termination law which is the central issue in the case at bench. *Campbell, supra*, at 1312. In determining whether ERISA preempts a state common law action for wrongful discharge seeking ancillary compensatory and punitive damages, both this Court and the Ninth Circuit have focused on the *employer's alleged motivation in terminating the employee*, holding that such an action is preempted when pleaded in the complaint, or during discovery, it becomes apparent that the employer had a pension defeating motive in terminating the employee. *Ingersoll-Rand, supra*, 111 S. Ct., at 483; and *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1405 (9th Cir. 1988) (state court wrongful termination action — no preemption when loss of benefits is not "a motivating factor" behind termination); *Campbell, supra*, at 1312.

In *Ingersoll-Rand,* the plaintiff brought a state common-law tortious termination action in violation of public policy against his former employer based *primarily* on the *employer's desire to avoid making contributions to or paying benefits under his pension fund.* The Court held plaintiff's claim "relates to"

an ERISA covered plan and is therefore preempted. In *Ingersoll-Rand, supra,* 111 S. Ct. at 483, the Court stated:

> Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.
>
> We have no difficulty in concluding that the cause of action which the Texas Supreme Court recognized here — *a claim that the employer wrongfully terminated plaintiff primarily because of the employer's desire to avoid contributing to, or paying benefits under the employee's pension fund "relate[s] to" an ERISA-covered plan within the meaning of § 514(a),* and is therefore pre-empted."

Id. at 483, italics in last para. added; *Campbell, supra,* at 1312.

The Ninth Circuit, in a number of cases, has similarly held that the employer's alleged motive in terminating the employee is critical in determining whether the claim is preempted by ERISA. Thus, a claim does not relate to ERISA "when the loss of pension benefits was a *mere consequence of, but not a motivating factor behind,* the termination of benefits." *Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1405 (1988), italics added; *Campbell, supra,* at 1312. In *Ethridge,* the plaintiff brought a claim for tortious discharge in state court, alleging that he was terminated from his employment in retaliation for his union activities. In his complaint, Ethridge alleged "the above said wrongful acts of Defendants, was a substantial factor in causing damage and injury to Plaintiff, including loss of employment and *benefits.*" *Id.* at 1404, italics in original; *Campbell, supra,* at 1312. Relying on plaintiff's use of the

word "benefits" in the damages allegations of the complaint, the defendant removed the case to federal court on the ground of ERISA preemption and then the district court dismissed the complaint. On appeal, the Ninth Circuit rejected defendant's argument that plaintiff's claim was preempted by ERISA. The Ninth Circuit found that Ethridge did not claim that his employer's true motivation for discharge was to deprive him of pension rights, but merely alleged that the loss of benefits was a consequence of or ancillary to his claim of tortious discharge. *Id.* at 1405; *Campbell, supra*, at 1312. Ethridge's claim for tortious discharge was, therefore, not preempted simply because he sought to recover tort damages in the form of lost salary and "benefits." Accordingly, *Ethridge* held: "[N]otwithstanding the strong preemptive force of ERISA, Ethridge's complaint cannot reasonably be read as stating a claim within the scope of ERISA." *Ethridge, supra*, at 1404; *Campbell, supra*, at 1312.

Similarly, in *Karambelas v. Hughes Aircraft Co.*, 992 F.2d 971 (9th Cir. 1993), the complaint did not allege a claim for relief under ERISA, although it did mention Karambelas was terminated just before his retirement benefits vested. *Id.* at 974. At his deposition, plaintiff testified he thought ("probably") that Hughes discharged him for the purpose of avoiding the vesting of his pension rights. Based on that deposition testimony Hughes removed the case to the district court, which then dismissed the case under Federal Rules of Civil Procedure, Rule 12(b)(6). The Ninth Circuit reversed the dismissal with instructions to the district court to remand the action to California state court on the ground the district court lacked jurisdiction over the case. The court based its decision on the finding that the "mere simulacrum of a possible unasserted ERISA claim was insufficient to form the basis for federal jurisdiction." *Id.* at 975; *Campbell, supra*, at 1312-1313. Thus, the mention of the loss of pension benefits as a consequence of the employee's termination did not give rise to ERISA preemption where the

"real" motivation for termination lies elsewhere.[4] The *Karambelas* court held:

> Here the heart and soul of the complaint is Karambelas' outrage at the fact that he was made a scapegoat for an alleged serious legal error committed by outside counsel and by his own boss. His complaint does mention that he was terminated just before his retirement benefits vested, but that was clearly in the nature of a jeremiad or, at most, a consequence of the scapegoating wrong that was perpetrated upon him.

Id. at 974; *Campbell, supra,* at 1313.

Campbell contends that *Ingersoll-Rand, Ethridge, Karambelas*, and numerous other Ninth Circuit cases all stand for a fundamental proposition, that is, where the alleged loss of

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4. Where the employee's wrongful termination action in fact claimed the employee was discharged to avoid paying benefits or to prevent the discharged employee from obtaining benefits, the Ninth Circuit has consistently held ERISA preempted the claim. *See, e.g., Tingey v. Pixley-Richard West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992) (wrongful termination claim preempted because plaintiff's sole theory was that his employer terminated him to deny him medical insurance benefits after his son was born with spina bifida); *Felton v. Unisource Corp.*, 940 F. 2d 503, 507 (9th Cir. 1991) (claim brought under state wrongful termination and state disability discrimination law was preempted because plaintiff alleged that employer fired him to avoid paying his medical insurance benefits after he contracted lung cancer); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987) (breach of contract/wrongful discharge claim based on theory that employer agreed to provide retirement benefits and then sought to prevent employee from acquiring those benefits was preempted to the extent that it referred to the covered employee benefits plan.) *Campbell, supra,* at 1313.

benefits is "a mere consequence of, but not a motivating factor behind" the termination, ERISA does not preempt the action. Accordingly, the *Campbell* court held:

> We nonetheless conclude that *Ethridge's* holding that a claim does not relate to ERISA when the loss of benefits is a "*mere consequence of, but not a motivating factor behind*" the termination[,] controls this case.

Campbell, supra, at 1313, italics added.

Petitioner makes no mention of this "motivating factor" test in its argument for preemption.

VI.

LOSS OF BENEFITS WAS NOT A MOTIVATING FACTOR BEHIND TERMINATION IN THIS CASE.

In the case at bench, the substance or gravamen of Campbell's claim was that he was wrongfully terminated by his former employer in retaliation of his whistle-blowing activities. He did not claim that the motivation for terminating him was Aerospace's desire to avoid paying him retirement benefits or to prevent him from obtaining such benefits. Rather, his mention of loss of retirement benefits in the future was, *at most*, a "mere consequence" of termination. This argument is supported by the fact that Campbell made his allegation of loss of benefits in the punitive damages paragraph of his complaint. His allegation that Aerospace knew that terminating him would negatively impact his retirement benefits was only alleged to satisfy the pleading requirements for punitive damages in California, in that defendant did the alleged wrongful acts with "oppression, fraud, or malice" which conduct is despicable and in "conscious

disregard" of plaintiff's rights. Calif. Civil Code, § 3294(c)(1) and (2). Such allegations do not convert this action into one that "relates to" a covered employee benefit plan which was intended by Congress to be preempted by ERISA. These allegations have nothing to do with the administration of Aerospace's covered employee benefits plan or Aerospace's desire to avoid paying him retirement benefits. The *Campbell* decision put it this way:

> The allegation of Aerospace's knowledge does not change the fact that the deprivation of benefits was not Aerospace's motive, but merely a proximate result of the termination. There is a discernible and critical difference between an employer who "knows" that the obvious consequences of terminating an employee for whatever cause include the loss of benefits and one who is "motivated" to terminate an employee for purposes of saving money or destroying the employee's benefits. Thus, Campbell's allegation that Aerospace knew he would lose his benefits as a consequence of his termination, made in his claim for punitive damages, does not state a cause of action that "relates to" an employee benefit plan. The substance of his tortious discharge claim was that Aerospace was motivated by a desire to retaliate for his whistle-blowing. To hold otherwise would be to revive the problem *New York State Conference* [*Travelers*] tried to eliminate, i.e., a definition so broad that nothing escapes its reach.

Campbell, supra, at 1313, bracket added.

This argument is also supported by the well reasoned Fifth Circuit Court of Appeals decision in *Rozzell v. Security Services, Inc.*, 38 F.3d 819 (5th Cir. 1994); *Campbell, supra,* 1313-1314.

Rozzell raised similar issues of ERISA preemption of a state court action where plaintiff alleged that his former employer had terminated him in retaliation for filing a workers' compensation claim against it. Defendant employer removed the case to federal court on the grounds that the complaint contained a claim implicating ERISA. Defendant's theory of preemption was based on an allegation in paragraph 8 in the complaint where plaintiff alleged that he was wrongfully terminated "to *willfully deprive plaintiff* of the compensation and *benefits* of [his] job." *Id.* at 821. Defendant contended that this allegation converted what would be ordinarily a state cause of action for tortious termination into a federal claim under the purview of ERISA and thus removable. Plaintiff's motion to remand was denied based on a finding by the district court that determination of plaintiff's damages necessitated reference to defendant's ERISA plan. Therefore, plaintiff's claim was necessarily federal in character and preempted by ERISA since it "relates to" an employee benefit plan. Following a bench trial held on the merits, the court rendered judgment for defendant employer and plaintiff appealed.

The Fifth Circuit vacated the judgment for defendant and remanded the matter to the district court with instructions to remand the case to the state court from which it had been removed. The court so ruled because it found the district court was without federal subject matter jurisdiction over the case because plaintiff's state court claim for tortious termination was not preempted by ERISA. *Rozzell, supra*, at 823; *Campbell, supra*, at 1313-1314.

In *Rozzell*, as in the case at bench, defendant employer argued, and the district court agreed, that plaintiff's punitive damages allegations that he was terminated in a willful attempt by defendant to deprive him of his "benefits" implicated ERISA preemption sufficient to warrant vesting the district court with

federal court jurisdiction. The Fifth Circuit disagreed. First, it noted that under the Supreme Court's decision in *Franchise Tax Board of Cal. v. Constr. Laborers Vacation Trust for So. Cal.*, 103 S. Ct. 2841 (1983), using the "well-pleaded complaint" rule and its corollary the "artful pleading" rule, the court will look past the words in the complaint to the "substance" of the claim alleged. *Rozzell, supra*, at p. 822. The *Rozzell* court stated that viewed from that perspective, it was "patently clear" that the "substance" of plaintiff's complaint was limited to a state law retaliatory discharge cause of action. The allegation referring to "benefits" was used by plaintiff only in his accusation of the requisite malice necessary under state law to plead a request for the assessment of punitive damages, and not as a separate independent claim for relief. The allegation of lost "benefits" merely related back to the retaliatory discharge "in order to punctuate that wrongful conduct." *Id.* at 822; *Campbell, supra*, at 1313-1314. *The allegation of lost "benefits" was merely an element of damages ancillary to a cause of action for wrongful discharge and was not an independent claim. Id.* at 823; *Campbell, supra*, at 1313-1314. The *Rozzell* court held, looking to the substance of the complaint, that it alleges only one cause of action, i.e., wrongful termination for retaliatory discharge governed exclusively by state law. *Id.* at 822-823; *Campbell, supra*, at 1313-1314. Thus, the *Rozzell* court concluded:

> [it] remains patently clear that the substance of his [discharged employee] claim is limited to the state law retaliatory discharge cause of action. He included the word "benefits" in his accusation of the requisite malice for punitive damages, not as a separate claim for relief. Rather, the allegation of lost "benefits" related back to the retaliatory discharge in order to punctuate that wrongful conduct. Therefore, the substance of Rozzell's complaint alleges only one

> cause of action that is governed exclusively by state law.

Id. at 822; *Campbell, supra*, at 1314, bracket added.

The Fifth Circuit's analysis of similar allegations in the complaint in *Rozzell* is precisely the position of the Ninth Circuit and the same argument Campbell makes in the case at bench. The only difference between the Campbell complaint and the Rozzell complaint is that the term "benefits" referred to in *Rozzell* is referred to as "retirement benefits" in *Campbell*; otherwise the two cases are essentially the same. In order to plead the requisite elements of oppression or malice under California Civil Code § 3294, paragraph 10 of Campbell's complaint alleges that Aerospace knew Campbell would be deprived of retirement benefits by the retaliatory discharge. Such allegations merely "punctuate" the claim of wrongful discharge due to his "whistle-blower" activities, and are parasitic to the state common law action, not a separate or independent claim that "relates to" Aerospace's covered employee benefit plan. Thus, according to *Rozzell*, ERISA does not preempt plaintiff's state court action and the case cannot be removed to the district court because it would lack federal jurisdiction. *Id.* at 822-823; *Campbell, supra*, at 1314.

VII.

CAMPBELL'S CLAIM IS NOT PREEMPTED AND THE DISTRICT COURT LACKED FEDERAL JURISDICTION.

In summary, all of the foregoing amply supports the Ninth Circuit's decision in this case that Campbell's state court common law tort action for wrongful termination is not preempted, since it meets "the objectives of the ERISA statute

as a guide to the scope of the state law that Congress understood would survive." *DeBuono, supra*, at 1751. Petitioner relies heavily on *Ingersoll-Rand* in support of its petition before this Court, but *Ingersoll-Rand* does not favor Aerospace. In *Ingersoll-Rand*, the employee alleged he was wrongfully terminated "because of the employer's desire to avoid contributing to, or paying benefits under the employee's pension fund" (*Ingersoll-Rand, supra*, at 483), and such allegations subjected employers to inconsistent standards concerning benefit plans. In *Campbell*, the Ninth Circuit correctly concluded that the existence of an ERISA plan was irrelevant to the employer's termination of Campbell. *Campbell, supra*, at 1314. In *Campbell*, the Court held:

> There is no risk of different state standards governing the same benefits-related conduct, because the conduct at issue here — the employer's employment decisions — is motivated by independent considerations. Thus, federal preemption of causes of action involving state wrongful termination law, where the employer's decisions are motivated by non-ERISA-related interests, would not serve "to promote the interests of employees and their beneficiaries in employee benefit plans."

Campbell, supra, at 1314, citing *Shaw*, 463 U.S. at 90.

Campbell's action was not preempted by ERISA and the federal court lacked subject matter jurisdiction over it.

CONCLUSION

For all of the foregoing reasons respondent respectfully prays the petition for writ of certiorari be denied.

Respectfully submitted,

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